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No. 84-1185 (2)

In The
Supreme Court of the United States
October Term, 1984

PETER S. RAZATOS,

Petitioner,

vs.

THE COLORADO SUPREME COURT, P. V. HODGES, R. B. LEE, W. H. ERICKSON, L. D. ROVIRA, G. E. LOHR, J. E. DUBOFSKY, and J. R. QUINN, in their official capacities as Justices of the Colorado Supreme Court,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Does due process require a state supreme court when reviewing the findings and recommendations of a hearings committee in an attorney disciplinary proceeding to grant a *de novo* hearing whenever credibility of the witnesses is a crucial issue?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 746 F.2d 1429 (10th Cir. 1984) and appears in the appendix to the petition at pp. A-1 to A-14. The opinion of the United States District Court for the District of Colorado is reported at 549 F. Supp. 798 (D. Colo. 1982) and appears in the appendix to the petition at pp. B-1 to B-6.

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JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 29, 1984, and the petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1) (1982).

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RULE AT ISSUE

Rule 252, Colorado Rules of Civil Procedure (1973)

The text of rule 252, as well as that of other relevant rules, is set out verbatim in the appendix to the petition, pp. C-1 to C-7. (The rules were repealed effective January 1, 1982, and were replaced by rules 241.1 through 241.25. 7A Colo. Rev. Stat., Colo. R. Civ. P. 241.1-241.25 (Supp. 1983). The procedures, however, remain substantially similar.)

STATEMENT OF THE CASE

In the underlying disciplinary proceeding, petitioner Peter Razatos was charged with four counts of personal misconduct. A formal hearing on these charges was held before a three-member hearings committee pursuant to the rules adopted by the Colorado Supreme Court to govern the determination of complaints against attorneys licensed in Colorado. In the proceedings before the hearings committee, Mr. Razatos defended against the charges by contending that he was acting as a real estate broker and not as an attorney during the transactions in question. The committee found otherwise, and upon review of the record the Colorado Supreme Court concluded that this finding of the committee was supported by clear and convincing evidence. See *People v. Razatos,* 636 P.2d 666, 671 (Colo. 1981). In its decision, the state court concluded that although Mr. Razatos testified he was not acting as an attorney, the attorney-client relationship was established by the record, particularly through the testimony of Mr. Razatos' client and two attorney witnesses, through the conduct of the parties during the transactions, and the fact that Mr. Razatos filed an attorney's lien to recover fees for the services he rendered. *People v. Razatos, supra* at 671. After concluding that the hearing committee's findings on this issue and other material issues were supported by clear and convincing evidence, and that the recommendations for discipline were appropriate, the court adopted those recommendations without modification and suspended petitioner from the practice of law for a period of 3 years. *People v. Razatos, supra* at 667. Mr. Razatos appealed the state court's decision to the United States Supreme Court, which denied the appeal for

want of a substantial federal question. *Razatos v. Colorado,* 455 U.S. 930 (1982).

Petitioner thereafter filed a section 1983 action in the federal district court naming as defendants the Colorado Supreme Court and its justices. In his complaint Razatos sought a declaratory judgment that rule 252, Colo. R. Civ. P., denied him due process because the rule does not require the final arbiters of fact, the Colorado Supreme Court, to personally hear the testimony of the accused or other witnesses when the credibility of the witnesses is crucial to the decision. The district court dismissed the complaint for lack of subject matter jurisdiction and, alternatively, on the ground that rule 252 does not violate due process. *Razatos v. Colorado Supreme Court et al.,* 549 F. Supp. 798 (D. Colo. 1982). The United States Court of Appeals for the Tenth Circuit reversed the district court decision with respect to jurisdiction but affirmed on the merits. *Razatos v. Colorado Supreme Court,* 746 F.2d 1429 (10th Cir. 1984). Petitioner now seeks review of the decision of the United States Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

The Court of Appeals for the Tenth Circuit correctly determined that rule 252 of the Colorado Rules of Civil Procedure complies with due process standards. Furthermore, petitioner failed to raise his present challenge to rule 252 in the disciplinary proceedings before the Colorado Supreme Court and thus comity considerations dictate against federal court intervention.

ARGUMENT

A. The Court Of Appeals For The Tenth Circuit Correctly Determined That Rule 252 Of The Colorado Rules Of Civil Procedure Complies With Due Process Standards.

The Colorado procedures for the determination of a formal complaint against an attorney at all times relevant to this case were set forth in rules 241 through 259 of the Colorado Rules of Civil Procedure, 7A Colorado Revised Statutes (1973). These rules provide for a formal hearing before a hearings committee composed of three attorneys. The hearing is conducted in conformity with the practice in the trial of civil cases and a complete record is made of the proceedings. Colo. R. Civ. P. 249. To warrant a finding of misconduct the charges must be established by clear and convincing evidence. At the conclusion of the formal hearing, a report setting forth the committee's findings and recommendations is prepared and submitted to a nine-member hearings panel for its approval or disapproval. Colo. R. Civ. P. 251 (1973).

If approved by a majority of the panel, the findings and recommendations of the committee are adopted in the panel's report. When the panel decides to recommend discipline, it files its report, findings and recommendations with the Colorado Supreme Court. Colo. R. Civ. P. 252. The respondent attorney is provided an opportunity to file exceptions to the panel's report, after which the parties may designate portions of the record and file briefs. The matter then stands submitted to the court on the briefs and on the designated record. Colo. R. Civ. P. 252. The recommendations of the hearings panel are advisory

only, and the Colorado Supreme Court retains the power to increase or decrease the sanction or dismiss the complaint. Colo. R. Civ. P. 252(B) (3) and (6).

Petitioner asserts that rule 252 violates the due process clause because it does not provide for a *de novo* hearing when issues of credibility are dispositive. To meet constitutional standards, it is argued, the Colorado Supreme Court must personally observe the witnesses whenever the case turns on the credibility of the witnesses, even where the findings of the hearings panel regarding credibility are supported by clear and convincing evidence and accepted without modification.

The Court of Appeals for the Tenth Circuit held that notwithstanding the absence of express provision therefor in rule 252, the Colorado Supreme Court has the discretionary right to hold a *de novo* hearing whenever necessary to provide due process. *Razatos v. Colorado Supreme Court, supra,* 746 F.2d at 1434. The Court of Appeals did not reach the question of whether due process would have required a *de novo* hearing if the court had rejected or modified findings of fact based on contested credibility assessments, but held that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a *de novo* hearing and view the witnesses itself. *Razatos v. Colorado Supreme Court, supra* at 1437.

Petitioner challenges this decision, arguing that the court of appeals erroneously "relied exclusively on this court's decision in *United States v. Raddatz,* 447 U.S. 667 (1980)," (petition, p. 6). Contrary to this assertion, the

Tenth Circuit's resolution of the due process claim proceeded not from the holding but from the type of analysis employed in *Raddatz,* which involved an examination of the three factors enunciated in *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), as applied to the circumstances of this case. See *Razatos v. Colorado Supreme Court, supra* at 1435 through 1437.

In applying the *Mathews v. Eldridge* analysis, the Court of Appeals first considered the private interests implicated. The court recognized that attorney disciplinary proceedings involve an important liberty interest but found the due process rights of the attorney in such proceedings do not extend as far as the rights of an accused in a criminal case. *Razatos v. Colorado Supreme Court, supra* at 1435. Examining the second *Mathews v. Eldridge* factor, the Court of Appeals concluded that the attorney disciplinary procedures followed by the Colorado court were sufficient to protect against a possibly unreliable credibility assessment. Those procedures, the court noted, require a showing of clear and convincing evidence in a hearing before a hearings committee of fellow attorneys, a review of the hearings committee's findings by a hearings panel and also by the Colorado Supreme Court, and an opportunity for the attorney facing charges to file exceptions to the findings of fact, certify relevant portions of the transcript to the court, and extensively brief the issues. Finally the Court of Appeals concluded the state court has the discretion to order a *de novo* hearing when credibility determinations appear questionable. *Razatos v. Colorado Supreme Court, supra* at 1436. With regard to the governmental interests at stake and the burden imposed by additional safeguards, the Court

of Appeals emphasized the interests of a state in regulating lawyers and declined to rule that the state high court must conduct a *de novo* hearing in all cases where credibility of the witnesses is dispositive "in light of the substantial safeguards that currently exist." *Razatos v. Colorado Supreme Court, supra* at 1437.

In his petition for writ of certiorari, Mr. Razatos argues as he did before the Court of Appeals that this Court's decision in *United States v. Raddatz, supra,* is distinguishable from the case herein because of the interests at stake and because a criminal defendant has a second chance to suppress evidence at trial. These arguments were considered by the Court of Appeals in the course of its analysis. The Court of Appeals concluded, however, based upon its application of *Mathews v. Eldridge,* not simply upon a comparison of the *Razatos* case and the *Raddatz* case, that the Colorado procedures comply with due process standards.

In addition to relying upon *Raddatz,* as distinguished, petitioner contends that his position is supported by the case of *Califano v. Yamasaki,* 442 U.S. 682 (1979). Petitioner's reliance upon *Yamasaki* continues to be misplaced. That decision dealt not with the right to a hearing before the ultimate decisionmaker, but with the right to an oral hearing before an impartial factfinder prior to recoupment of social security overpayments. The Colorado disciplinary procedures are in full accord with the due process standards for an oral hearing discussed in *Yamasaki.*

B. Petitioner Failed To Raise His Present Challenge To Rule 252 In The Disciplinary Proceedings Before The Colorado Supreme Court And Thus Comity Considerations Dictate Against Federal Court Intervention.

Petitioner did not question the constitutionality of rule 252 when he was before the state supreme court or in his subsequent appeal to the United States Supreme Court. He waited until after the dismissal in *Razatos v. Colorado, supra* to raise the issue for the first time in the United States District Court. In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) this court noted "eminently defensible" policy reasons for disallowing a section 1983 claimant from litigating in federal court an issue the claimant elected not to raise during the state court proceedings. *Feldman, supra* at 484, n. 16; see also *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). As this court stated in *Feldman,* the rationale behind federal restraint is that state courts are competent to adjudicate federal constitutional questions. If the state court has not been provided the first opportunity to act, the state is precluded from giving the statute a saving consideration in response to the federal constitutional arguments. *Feldman, supra* at 484, n. 16, citing *Cardinale v. Louisiana,* 394 U.S. 437, 439 (1969). This rationale should apply with even greater force when a 1983 litigant is seeking a writ of certiorari.

CONCLUSION

Petitioner seeks a determination that the final decision-maker in attorney discipline, and consequently other cases involving equivalent private interests, must conduct

a *de novo* hearing whenever it has the authority to conclude that there was not clear and convincing evidence to support the credibility findings of the trier of fact. petition, p. 10. Petitioner insists upon the right to a *de novo* hearing even in cases such as the present one where a full due process hearing has been provided and where the findings regarding credibility are supported by the record and adopted without modification. The holding of the Tenth Circuit Court of Appeals that the Colorado attorney disciplinary scheme affords sufficient procedural safeguards to alert the Supreme Court to instances when it should exercise its discretion to conduct a *de novo* hearing and view the witnesses itself does not satisfy petitioner; he would require an absolute right to a *de novo* proceeding in all cases where the credibility of the witnesses is a crucial issue. Petitioner's position, if correct, would render invalid the established procedure of review on the record and would impose an insurmountable burden upon an already over-burdened judiciary.

DATED this 18th day of March, 1985.

Respectfully submitted,

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